SHARE

July 28, 2023

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission, New Brunswick
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Ontario Securities Commission
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

To the attention of:

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario M5H 3S8
Email: comment@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Email: consultation-en-cours@lautorite.qc.

To whom it may concern;

RE: **CSA Notice and Request for Comment – Proposed Amendments to Form 58-101F1 Corporate Governance Disclosure of National Instrument 58-101 Disclosure of Corporate Governance Practices and Proposed Changes to National Policy 58-201 Corporate Governance Guidelines**

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We are writing to comment on the Canadian Securities Administrators' (CSA) proposed amendments to the above, related to expanding board- and executive-level diversity-related disclosures.

SHARE, both on its own as a shareholder advocate, and alongside our many institutional investor colleagues, has met with many of you to discuss this issue and our proposed reforms over the past few years. We appreciate the time you have taken to review the options and the steps taken to enshrine them in regulation, and trust that the current consultation will allow us to arrive at an even stronger disclosure regime that assists institutional investors and issuers in meeting our respective responsibilities.

As a general response to the CSA's request for comment, we favour the approach recommended in Form B of your proposal. We do not believe that Form A will deliver meaningful, comparable or comprehensive results for investors, nor will it deliver much-needed clarity for market participants – either issuers or investors.

Below we outline some of our primary concerns with the approach in Form A, and why we favour the approach in Form B.

Better diversity disclosures are necessary to meet investors' fiduciary duties

Institutional investors make use of these disclosures to inform voting and stewardship decisions, as well as asset selection decisions where good governance and management are factors in that process.

This is not an add-on to investor practice, but a necessary consideration supported by years of studies and evidence that point to the financial and risk management advantages of more diverse boards and management.

To fail to consider these data when they may be material to investor decisions would be a liability for investment decision-makers. Accordingly, any regulatory decision should be made with a view to facilitating these key investor decisions, and done in a way that eliminates confusion rather than perpetuating it.

Form B is best aligned with Canadian laws and existing practice and avoids confusion

The regulators favouring Form A have expressed the view that securities regulators should not select categories of diversity. However Form B's designated categories are not arbitrary. They have been determined by human rights legislation, the *Canada Business Corporations Act*, and the Canadian *Employment Equity Act,* and tested by the Canadian courts. These are also broadly consistent with human rights regimes in key Canadian provincial jurisdictions. There is a substantial body of law which addresses the use of these categories and protections associated with them.

As such, regulators are on solid legal ground in using these categories as a baseline, and issuers can rely on that legal certainty in preparing their own disclosures.

Rather than legal certainty, expecting issuers to self-determine the appropriate categories for diversity disclosures – as per Form A – creates legal risk for the issuers.

The sole addition to these categories proposed in Form B is to include LGBTQ2SI+ as a category. While this is not yet included in the *CBCA* requirements, our best information is that this is likely to be included in future amendments and it would not be out of place to anticipate this in securities regulation. Further, the place of LGBTQ2SI+ protections in Canadian employment and human rights law is already firmly established, making it an appropriate category for inclusion.

As the CSA has noted, approximately 29% of TSX listed issuers report under the CBCA. Establishing a different disclosure standard for the other 71% of issuers, as proposed in Form A, would add to confusion and inconsistency in the Canadian market.

Regulators should be seeking to simplify and clarify matters for market participants, not complicate them.

Form B is the best option for burden reduction

We understand that regulators are also looking to balance the needs and concerns of issuers that will be required to collect these data and produce these disclosures. Accordingly, regulators may be tempted to favour an approach that appears, on the surface, to be less onerous and to allow issuers the maximum leeway in determining what is most important to disclose.

While we sympathize with this concern, we believe it will ultimately leave both issuers and investors dissatisfied and, in fact, subject to even more burdensome requests for disclosures.

Form A's voluntary identification and disclosure of relevant groups or categories would lead to inconsistent reporting and lack of transparency and would create an added burden for investors to decipher inconsistent and unclear disclosures from issuers. This would in turn perpetuate the existing situation in which multiple investors request a variety of different types of disclosures or explanations from issuers, wasting management and investor time in engagement meetings to decode unclear disclosures.

Worse still, some investors may rely on data providers and/or advisors that try to determine diversity on boards from unclear disclosures or even board photographs, which is unreliable and highly problematic.

Form B is a floor, not a ceiling

Regulators and issuers may be concerned that the specific circumstances of each issuer may be lost or obscured when a standardized form is required, as recommended in Form B.

However, this is true in almost every regulatory circumstance. For example, securities regulators require consistent reporting on financial metrics, but issuers are still allowed to report additional metrics – with an explanation of how they are reconciled to established financial metrics. Those additional data may provide investors with a better understanding of the specifics of the business, but they do not replace the standardized and comparable data required under our financial reporting regime.

Similarly, in this circumstance no issuer is precluded from providing additional disclosures or explanatory materials that assist investors in understanding their approach to diversity and specific categories that may not be reflected in Form B.

These disclosures should not replace the standardized requirements in Form B, but may be supplemental to that.

The guidelines accompanying Form B provide for greater reflection on governance, how diversity fits into strategy and what the mechanisms are to achieve diversity by requiring answers to specific questions.

The absence of effective guidance in Form A is likely to replicate the experience in the earlier days of gender diversity disclosures in Canada, when too many issuers produced unhelpful boilerplate responses in the absence of more effective direction from regulators. Those disclosures did little to help investors make decisions and in turn, did little to reduce the burden on issuers who had to field additional and individualized questions from institutional investors that needed better information to meet their own duties.

There are challenges with voluntary self-disclosure, but these are manageable

Both Form A and Form B disclosures may suffer from incompleteness when based on voluntary self-disclosure, as people may feel unsafe in disclosing their sexual or gender identity, sexual orientation, race, or disabilities. This is not a problem faced uniquely in this regulatory discussion – it is a constant question for employers and employees in building safe and inclusive workplaces.

The work being done by issuers to build inclusive corporate cultures, where employees feel safe enough to self-identify, should improve upon disclosures. Increasing disclosure helps to make the presence of individuals from traditionally under-represented groups more visible at senior levels of the organization, encourages a more inclusive culture generally, and thus should improve the accuracy of disclosures over time.

To be clear, Form A is no answer to this problem. When we use categories that are well-defined by regulators and consistent with Canadian employment law – as per Form B – we lessen the risk of issuers using other categories that might be even more intrusive or problematic for individuals.

Issuers working in certain international jurisdictions may be concerned that disclosure of executive or board-level diversity may pose a risk for certain people when present in those jurisdictions. We trust, however, that individuals at the executive or board level of seniority are capable of assessing

that risk and making appropriate decisions about self-disclosure. No one should be forced to disclose personal information under either the Form A or Form B approach.

We have all learned and accepted that no single approach or regulatory step is going to be perfect within a complex social environment. But acknowledging imperfection is no reason to abdicate the responsibility to regulate clearly and fairly.

Form B should also address executive-level disclosures, as per CBCA.

We believe Form B should apply to executive-level disclosures, not just board-level disclosures. The inclusion of executive-level disclosures is important to investors to assess the company's talent pipeline and management effectiveness, which are critical to investment decisions. These disclosures are already a requirement under the CBCA and should be made consistent across the rest of the market.

Target-setting is needed to make policies effective

The *Ontario Capital Markets Modernization Task Force* recommended in January 2021 that the Ontario government

> *Amend Ontario securities legislation to require publicly listed issuers in Canada to set their own board and executive management diversity targets (aggregated across both groups) and implementation timelines, and annually provide data in relation to the representation of those who self-identify as women, BIPOC, persons with disabilities or LGBTQ2SI+ on boards and executive management. For greater clarity, this would apply to directors and executive management, the latter of which is defined as those who are executive officers or Named Executive Officers of publicly listed issuers.*
>
> *The Taskforce recommends that publicly listed issuers set an aggregated target of 50 per cent for women and 30 per cent for BIPOC, persons with disabilities and LGBTQ2SI+. Implementation of these targets should be completed within five years to meet the target for women and seven years to meet the target for the other diversity groups, placing specific focus and emphasis on representation of Black and Indigenous groups.*[1]

Setting and disclosing time-bound targets is the most effective way to enhance diversity in board and executive positions. Absent targets, experience shows that the pace of reform will be insufficient. In the near term, we believe that issuers should be required to set targets *of their choosing* for the representation of Black, Indigenous and People of Colour (BIPOC) individuals in board and executive positions, and *consider* setting targets for other underrepresented groups, taking into consideration the designated groups identified under the *CBCA* and protected grounds under the federal *Employment Equity Act*. This approach would facilitate the development of appropriate strategies and targets to improve diversity practices without the threat of regulatory non-compliance, as the last five years under the disclosure requirements for gender have allowed.

[1] https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22-v2.pdf

We recommend that after a five-year period, the CSA review progress to date and set requirements for specific targets, at minimum, with respect to BIPOC.

Ontario has signaled the need for change, and Ontario should proceed if there is no consensus.

We urge the CSA to act quickly and uniformly to adopt the Form B approach and issue clear regulations for issuers that can be swiftly implemented. While we favour a cross-Canada regulatory approach, we believe that this issue is important enough for institutional investors and has suffered too long from uncertainty, confusion, and obfuscation. Further, it has already been subject to consultation and discussion with securities regulators for years.

In the absence of a clear consensus, or if there is unnecessary delay in acting by the CSA as a whole, the Ontario Securities Commission should act unilaterally to develop the Form B approach, with any appropriate modifications as noted above, and take the necessary steps to issue new regulations before the end of 2023.[2]

If you would like to discuss any of the points raised in this letter, please feel free to contact me and arrange a further discussion.

Sincerely,

[redacted]

Kevin Thomas
Chief Executive Officer, SHARE

[2] We note that the Government of Ontario has signaled an imperative for the OSC to act on this issue. In the 2023 Ontario budget, the Government of Ontario committed that it *"will continue to work closely with the OSC to protect investors, foster more competitive capital markets, and continue modernization efforts, including enhancing corporate diversity."*